IN THE

Supreme Court of the United States

October Term, 1977

No. 77-739

PETER BARRY GURTENSTEIN,

Petitioner,

vs.

PEOPLE OF THE STATE OF CALIFORNIA,

Respondent.

Petition for a Writ of Certiorari to the Court of Appeal, Second District, State of California.

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The petitioner, Peter Barry Gurtenstein, respectfully prays that a writ of certiorari issue to review a final order issued on August 25, 1977, by the Supreme Court of the State of California denying the petitioner a hearing on his petitions to review the California Court of Appeal judgment rendered on April 29, 1977.

Opinions Below.

There was no formal opinion rendered by the Supreme Court of the State of California. The denial of petitioner's petition for hearing is reported in the Minute Orders of the California Supreme Court of August 25, 1977, 2d Crim. 28714, Div. 5 (Appendix A, *infra.*) The opinion of the Court of Appeal of the State of California, Second Appellate District, Division Five, is reported at 69 Cal.App.3d 441, 138 Cal.Rptr. 161 (1977). (This opinion is reproduced in Appendix B to this Petition.)

Jurisdiction.

The denial order of the Supreme Court of the State of California was filed and entered on August 25, 1977. (See Appendix A, *infra.*) The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1257(3).

Questions Presented.

1. Whether the evidence used against petitioner in the state prosecution was obtained in violation of his Fourth Amendment and Fourteenth Amendment rights under the Constitution of the United States.

2. Whether 49 U.S.C. §1511(b) and the common law places an obligation upon airlines to inform shippers that all packages and items shipped air freight are subject to an x-ray, magnetometer scanning process and possible subsequent search. Whether the failure to provide to the shipper reasonable notice of the airline search procedure denied him of protections extended under 49 U.S.C. §1511(b) and the Fourth and Fourteenth Amendments of the United States Constitution.

3. Whether the denial of pretrial discovery motions denied the petitioner a fair trial and due process protections of the United States Constitution.

4. Whether the state court's ruling that the consent to conduct a warrantless search of the petitioner's home was freely and voluntarily given was in contradiction to the guidelines set forth by this Honorable United States Supreme Court and in violation of the petitioner's Fourth and Fourteenth Amendment rights.

Constitutional Provisions and Statutes Involved.

Constitution of the United States, Amendment IV:

"The right of the pople to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

"No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

Constitution of the United States, Amendment XIV, §1:

". . . nor shall any state deprive any person of life, liberty, or property without due process of law. . . ."

49 United States Code, Section 1511:

"(a) The Administrator shall, by regulation, require any air carrier, intrastate air carrier, or foreign air carrier to refuse to transport—

(1) Any person who does not consent to a search of his person, as prescribed in Section 1356(a) of this title, to determine whether he is unlawfully carrying a dangerous weapon, explosive, or other destructive substance, or

(2) Any property of any person who does not consent to a search or inspection of such property to determine whether it unlawfully contains a dangerous weapon, explosive, or other destructive substance.

Subject to reasonable rules and regulations prescribed by the Administrator, any such carrier may also refuse transportation of a passenger or property when, in the opinion of the carrier, such transportation would or might be inimical to safety of flight.

(b) Any agreement for the carriage of persons or property in air transportation or intrastate air transportation by an air carrier, intrastate air carrier, or foreign air carrier for compensation or hire shall be deemed to include an agreement that such carriage shall be refused when consent to search such persons or inspect such property for the purposes enumerated in subsection (a) of this section is not given."

Statement of the Case.

On June 5, 1975, in a five-count information, the petitioner was charged on Count I, violation of California Health and Safety Code, Section 11378a, namely, possession of barbiturates for sale; Count II, violation of California Health and Safety Code, Section 11351a, namely, possession of amphetamines for sale; and Count V, violation of California Health and Safety Code, Section 11357a, namely, possession of marijuana.

On June 6, 1975, petitioner was arraigned and entered pleas of not guilty to all counts. Appellant's motions under California Penal Code, Section 995 to set aside the Information was presented and denied on January 8, 1976.

On February 19, 1976, a motion for pretrial discovery was presented and denied.

On March 3 and 4, 1976, petitioner's motion pursuant to California Penal Code, Section 1538.5 was presented and denied. On March 4, 1976, petitioner

withdrew his earlier pleas on not guilty and entered a plea of guilty to Count I of Information No. A 188 223. Counts II and V were dismissed.

On April 19, 1976, petitioner, through his attorney, filed a notice of appeal. On September 8, 1976, petitioner filed his opening brief to the Court of Appeal, State of California, Second Appellate District. In an opinion filed on April 29, 1977, the California Court of Appeal, Second Appellate District, Division Five, held that there was no error in the trial court's refusal to grant appellant's motion for discovery. Further, the court held that the search which took place at Logan Airport in Boston was reasonable and in addition, the court found that the search conducted at the residence was not unlawful, since the court deemed it to be made pursuant to the appellant's consent. In conclusion, the court held that the motion to suppress evidence pursuant to California Penal Code, Section 1538.5 was properly denied and the lower court judgment was affirmed. (See Appendix A.)

On June 9, 1977, and August 18, 1977, petitioner filed, respectively, a Petition for Hearing and Supplemental Petition in the Supreme Court of the State of California. On August 25, 1977, the petitions were summarily denied. (See Appendix B.)

Statement of the Facts.

On April 9, 1975, a Trans World Airline employee, FRANK CAMPBELL, was working in the air freight shipment department of Logan Airport, Boston, Massachusetts. At approximately 3:15 p.m., of that date, CAMPBELL accepted a Next Flight Out (NFO) shipment, destination Los Angeles, from an unidentified male. The man stated that the package contained cloth

material and he wanted the package to be shipped on the 4:00 p.m., flight of that day.

CAMPBELL noticed that the package had neither the name nor address of a consignee. Upon being informed that the information should be supplied, the shipper listed "One of a Kind" as the consignee.

CAMPBELL felt that this was unusual and testified at the suppression of the evidence hearing pursuant to California Penal Code, Section 1538.5, "I suspected that this could be a bomb that was in this bag. . . ." CAMPBELL had not told the shipper that the package would be x-rayed, nor were there any signs or notices warning the shipper of the x-ray procedure and the possible search of the shipment. After the shipper left, CAMPBELL scanned the package through the x-ray machine. The machine showed no signs indicating metallic contents and merely indicated the general outline of a suitcase inside the box.

CAMPBELL indicated that he had no prior experience in x-raying bolts of cloth or fabric. He further admitted that he had not received any formal training in the operation of the x-ray magnetometer machine from anyone, including the airlines, manufacturer of the machine and governmental agencies.

With regard to the type of image that CAMPBELL was generally on guard for when x-raying packages, the following critical testimony was elicited at the suppression hearing:

> "Q. BY MR. MINKIN: What would you see on the x-ray machine which would suggest to you that there was an explosive device inside of a package? Can you tell this court?
>
> "A. Yes, If you saw something in there that looked like metal or iron or anything like that,

then you would draw the conclusion that this could very well be an explosive device. Therefore, you would open it up and check it.

"Q. All right.

"A. All right.

Now, when you talk about metal or iron, are you talking about those substances as a shield so that an x-ray picture could not be taken of the interior? Or, are you talking about components that are made of metal?

"A. I'm talking about the contents of this package or bag. If there was any items like that in there that looked like an explosive device, it would show up on the x-ray machine.

"Q. All right.

Now, did you have in your mind on that occasion what kind of device would be an explosive device that would show up on the x-ray machine? Did you have some image in your mind of what you're looking for?

"A. Well, yes. To a certain extent, you would.

"Q. Okay.

Would you tell the court what kind of device you are looking for?

"A. Well, if I saw something inside the bag that looked like a can or an oblong article, anything in that—in the form of iron, or it could even be tin, that could show up like an explosive device—

"Q. Okay.

I think we are all familiar with the explosive device the alarm clock and, you know, the sticks of dynamite.

"A. That's correct.

"Q. That would be one image that you have in mind; right?

"A. Yes.

"Q. Now, were you aware at that time that there were other kinds of explosive devices, other than the stereotype alarm clock with the sticks of dynamite that would be activated by the alarm clock?

"A. No. I don't think it was.

"Q. So essentially at that time you were looking for sticks of dynamite and some kind of timing device which would activate the explosive?

"A. That is correct."

The package in question was described as a taped cardboard box, 18″ x 6″ to 8″, weighing approximately 30 pounds. CAMPBELL felt that the package seemed somewhat heavy; he indicated that this might be due to the fact that most shippers have an interest in packing as much as possible into a given box.

Based on his suspicions, CAMPBELL notified his supervisor who summoned Officer RICHARD DAVIS, assigned to the bomb squad of the Massachusetts State Police. Upon DAVIS' arrival within a few minutes, he was informed by CAMPBELL of the NFO package; of the shipper's insistence that the package be shipped on the 4:00 p.m. flight to Los Angeles; of the x-ray picture that showed the box "to be empty"; of the initial absence of a name and address on the package; and of the apparent nervousness of the shipper.

At the suppression hearing, officer DAVIS testified that based on foregoing factors, he speculated that the package may have contained some kind of non-metallic bomb that could possibly not show up on

the x-ray machine. DAVIS had been told that the purported content of the package was cloth. DAVIS indicated that on prior occasions when the x-ray showed blank, he either did not open the package or upon opening such packages, he found no bombs. DAVIS testified that he was concerned about the shipper's insistence that the package go out on the 4:00 p.m. (next flight out) plane. However, DAVIS also stated that wanting a package to depart on the next flight is not suspicious in itself.

In order to search the package, DAVIS decided to open it where it was, at the air freight shipment area. Upon examining the package DAVIS noticed that the top of the box was open and that he was able to see a suitcase inside the box. DAVIS proceeded to inspect the box for "booby traps". He was satisfied that there were no traps and slid the suitcase out onto the counter. DAVIS next examined the suitcase for traps or anti-opening devices. Again, he detected none. The locked suitcase was opened by playing with the combination lock. Upon opening the suitcase, DAVIS discovered that it contained pills in transparent plastic baggies.

This search was conducted without a search warrant and without officer DAVIS personally passing the box or suitcase through the x-ray device prior to opening the shipment. After conducting the search of the locked suitcase, narcotic officers were summoned to the scene.

(From this point, the events jump to occurrences in Los Angeles, California, on April 15, 1975.)

On April 15, 1975, at approximately 8:30 p.m., pursuant to a surveillance of the "One of a Kind Dress Shop" in Los Angeles, California, a woman,

later identified as KATHLEEN CAMPBELL, was observed leaving the dress shop and followed to the Los Angeles International Airport.

At the Los Angeles International Airport, CAMPBELL was observed receiving a package from an airline employee. This package contained controlled substances and had been dusted with ultraviolet powder for identification purposes. CAMPBELL was followed to a house in the Palos Verdes Estates, Los Angeles County, California. At this time approximately 7 to 8 law enforcement officers were deployed around the house.

Special Agent JOSEPH DALY knocked on the door of the residence and through a window in the front door, covered with a thin gauze curtain, DALY observed the petitioner approach the door. Upon announcing, "Federal Agents, you are under arrest," he observed the petitioner move quickly toward the rear of the house. At this point, entry was forced. Immediately after hearing the forced entry at the front door, agents stationed at the rear door forced entry after announcing "Police Officers".

Following the entry into the house, petitioner GURTENSTEIN and KATHLEEN CAMPBELL were immediately handcuffed. The petitioner was taken into a bedroom at the rear of the house. In this bedroom narcotic agents observed the suitcase in question and also observed on the floor of the bedroom a cardboard box top containing a green leafy substance resembling marijuana. The petitioner was then formally placed under arrest for possession of dangerous drugs and advised of his rights pursuant to *Miranda*.

At this point, the agents attempted to obtain consent from the petitioner to search the premises. Regarding

this point, Officer STANLEY of the Los Angeles Police Administrative Narcotics Division, testified as follows at the evidentiary suppression hearing:

> "A. I advised him that I wanted to search the house for any additional contraband, narcotics.
>
> "He said—
>
> "And I advised him that could either apply for a search warrant from a magistrate, and that the magistrate would have to make a decision. Or I could have his consent to search the house.
>
> "And he hesitated and said that, briefly, that I could go ahead and search the closet.
>
> "And I told him that that wasn't enough; that if I—if I was to complete my work or that I wanted to complete my total work, that I would have to have a consent to search the entire house, and I would go down and apply for a search warrant.
>
> "And he then stated that, 'Well, you've got the marijuana. Go ahead and search. You can go ahead and search the house.' "

The officers then proceeded to conduct a search of the residence. A brown suitcase was found inside the closet of the same bedroom where the petitioner had been placed. The petitioner stated to the officers that the suitcase was not his. The officers forced entry into the suitcase with a screwdriver. The suitcase was discovered to contain seven bags of red tablets, later determined to be 7,000 secobarbitals.

Officers proceeded to seize three large bags of secobarbitals from a small box found in the bedroom; approximately 1,000 secobarbitals from a jar on a dresser drawer; various narcotics paraphernalia; am-

phetamines; marijuana and hashish from a dresser drawer.

Officer STANLEY testified that at some point after the search had begun, the petitioner was asked to sign a written consent to search form, but refused to do so.

The petitioner was charged with violations of the California Health and Safety Code in an information issued on June 5, 1975.

REASONS FOR GRANTING THE WRIT.

It is requested that this Honorable Court grant the writ because the petitioner was denied his rights under the Fourth, Fifth and Sixth Amendments of the United States Constitution. Further, the method of x-raying and searching the package at Logan's Airport, Boston, Massachusetts, did not comply with the protections extended under 49 U.S.C. §1511 and was in violation of the Fourth Amendment. Violations of the above listed amendments are made applicable to state action by the Fourteenth Amendment of the United States Constitution.

ARGUMENT.

1. The Petitioner Has Standing to Assert Fourth Amendment Violations Which Occurred in the Search of the Package at Logan's Airport, Boston, Massachusetts.

Even though the shipper, whose contact with the TWA air freight employee originated the series of events which led to the arrest of the petitioner, was never arrested nor identified, the petitioner submits that he has standing to assert violations of Fourth Amendment rights in the search of the package and suitcase during the activity of police agents at Logan's Airport, Boston, Massachusetts.

The petitioner concedes that a vicarious exclusionary rule is not required under the present interpretation of the Fourth Amendment. *Alderman v. United States,* 394 U.S. 165, 171-176 (1969). However, it is equally clear that this interpretation does not bar a State to "impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so." *Cooper v. California,* 386 U.S. 58, 62 (1966). In addition, states "may extend the exclusion rule and provide that illegally seizes evidence is inadmissible against anyone for any purpose." *Alderman v. United States, supra* at 175.

The California courts have adopted a liberal policy in the exercise of exclusionary rights extended by the Fourth Amendment. The *Martin* rule of vicarious standing in California rests "not on the ground that the Government must not be allowed to profit by its own wrong and thus encouraged in the lawless enforcement of the law." *People v. Martin,* 45 Cal.2d 755, 761, 290 P.2d 855 (1955). Thus, California law provides

standing to exert one's exclusionary rights "whether or not it (the evidence) was obtained in violation of the particular defendant's constitutional rights." *Id.*

This interpretation and policy was fully discussed and reaffirmed in *Kaplan v. Superior Court,* 6 Cal.3d 150, 161, 491 P.2d 1 (1971).

In the present case, the series of events, which led the Government agents to the petitioner, arose from the conduct at Logan's Airport, Boston, Massachusetts. The claimed violation of Fourth Amendment protections as a result of the search of the box and suitcase shipped directly by the police to petitioner GURTENSTEIN. The items discovered were used to file the charges against petitioner, and in addition, were at the foundation of the entire proceedings.

Thus, based on the vicarious exclusionary rule followed by the California courts, the petitioner has standing to assert a violation of Fourth Amendment protections which occurred in the search conducted at Logan's Airport, Boston, Massachusetts.

2. The Evidence Obtained as a Result of the Search Conducted at Logan's Airport Was Obtained in Violation of Fourth Amendment Protections.

It is well established that a search conducted without a warrant is viewed with closer scrutiny than those searches in which a warrant has been issued by a magistrate. The United States Supreme Court in *Coolidge v. New Hampshire,* 403 U.S. 443, 454-455 (1971), quoting from *Katz v. United States,* 389 U.S. 347, 357 (1967), stated the well accepted principle that, "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject

only to a few specifically established and well-delineated exceptions." (emphasis in original).

This Honorable Supreme Court has never directly dealt with the validity and rationale of airport screenings and searches, yet, such searches have generally been permitted under an administrative search exception, *United States v. Davis,* 482 F.2d 893 (9th Cir. 1973); *People v. Hyde,* 12 Cal.3d 158, 524 P.2d 830 (1974); *Camara v. Municipal Court,* 387 U.S. 523 (1967); or under a *Terry* search rationale, *United States v. Ruiz-Estrella,* 481 F.2d 723 (2d Cir. 1973); *United States v. Epperson,* 454 F.2d 769 (4th Cir. 1972); *United States v. Lindsey,* 451 F.2d 701 (3d Cir. 1971).

The petitioner does not refute the accepted legality of airport screening devices, but he submits that the use of these machines does not automatically provide carte blanche authority to search packages at will. The leading California case on the subject of airport screening searches, *People v. Hyde, supra,* provides guidance in defining the purpose of this administratiave search:

> "[i]n upholding airport screening procedures because of their regulatory nature, we recognize that '[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which render its initation permissible.'" (citations omitted). "Preboarding inspections must be confined to minimally intrusive techniques *designed solely to disclose the presence of weapons or explosives.*" *Id.,* at 168. (Emphasis added.)

It appears that under the administrative purpose doctrine a warrantless search may be executed provided

it meets a test of reasonableness. *Untied States v. Davis, supra* at 910; *Camara v. Municipal Court,* 387 U.S. 523; *People v. Hyde, supra* at 168. For a valid warrantless search of a package or person intended to be placed on a plane, there must be some exigent circumstances to create an expectation that explosives or firearms are contained within the package or in control of the individual. *People v. Hyde, Id.* It becomes "reasonable" to search a package intended to be placed aboard an airplane only when such exigent circumstances exist.

The petitioner submits that the facts before Massachusetts State Police Officer DAVIS did not give rise to a reasonable expectation that the package contained explosives. Thus, the warrantless search conducted by Officer DAVIS violated Fourth Amendment protections.

In the instant petition, the x-ray of the package did not show the presence of any metallic or explosive-like items within the package. When the officer opened the package, he did so without first passing it through the x-ray scanner, personally. He opened the shipment merely on the advice of an airline employee, who had not even been formally trained on the use of the x-ray machine.

Upon discovering the enclosed suitcase, the police officer examined the exterior of the suitcase and found no wires or other indication of explosives. Although Officer DAVIS had no contact with the shipper, no examination of the package through the x-ray scanner and no signs of wires or other explosive hook-ups upon examining the suitcase, he still continued to search the contents of the suitcase. The petitioner submits that this action is repugnant to the protections afforded

by the Fourth and Fourteenth Amendments. Granted that airport searches can be conducted on less than probable cause to search, the present case lacks specific and articulable facts to arouse a reasonable suspicion regarding the contents of the package.

The California cases covering airport searches all involved some specific factor which logically justified and warranted additional intrusion into the passenger's privacy. In four California cases a magnetometer scan gave a positive reading for metal. See *People v. Hyde, supra; People v. Tiffany,* 44 Cal.App.3d 179, 118 Cal.Rptr. 462 (1974); *People v. Bleile,* 44 Cal.App.3d 280, 118 Cal.Rptr. 556 (1974); *Morad v. Superior Court,* 44 Cal.App.3d 436, 118 Cal.Rptr. 519 (1974). In both *Hyde* and *Morad,* the defendants produced a positive reading on the magnetometer scan and fitted the F.A.A. behavioral profile of a potential hijacker.

The petitioner submits that the observations of innocent facts by Officer DAVIS did not justify the intrusion into the cardboard box and the suitcase. Since the purpose of the screening process is to identify those items of potential danger, it must be concluded that it becomes "reasonable" to search a package intended to be placed aboard an airplane only when such exigent circumstances exist. Since the circumstances before the airline employee and the officer did not establish these facts as an "exigent" situation, the petitioner contends that the evidence present in this case is insufficient to justify the warrantless search of the package.

This Honorable Court in *United States v. Chadwick,* 433 U.S. 1, 97 S.Ct. 2476 (1977), provided the following fundamental principles:

> Our fundamental inquiry in considering Fourth Amendment issues is whether or not a search or seizure is reasonable under all the circumstances. *Cooper v. California,* 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967). The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1949). Once a lawful search has begun, it is also far more likely that it will not exceed proper bounds when it is done pursuant to a judicial authorization "particularly describing the place to be searched and the persons or things to be seized." Further, a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search. *Camara v. Municipal Court,* 387 U.S. 523, 532, 87 S.Ct. 1727, 1732, 18 L.Ed.2d 930 (1967). 97 S.Ct. at 2482.

As in *Chadwick,* the present case presents a situation where the police maintained control over the package. There was no fear that the contents could be destroyed by the shipper and the level of expectation of privacy

is the same whether the item is a suitcase wrapped in a package or a double-locked footlocker. Based upon these facts, there was no justifiable purpose for violating the shipper's and petitioner's Fourth Amendment protections.

The petitioner submits that based upon the facts before the Government officer, he did not have sufficient evidence to reasonably conclude that the package and suitcase be searched contained explosives. It is necessary to draw a line to prevent the police from usurping the duties of an impartial magistrate. "[W]hen no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority." *United States v. Chadwick,* 97 S.Ct. at 2486. Further, the court in *United States v. Davis, supra,* heeded this warning: "[T]here is an obvious danger . . . that the screening of passengers and their carry-on luggage for weapons and explosives will be subverted into a general search for evidence of crime. If this occurs, the courts will exclude the evidence obtained." (482 F.2d at 909, footnotes omitted). The petitioner contends that in the present case, there was insufficient evidence to allow the officer to view the situation as "exigent" and therefore any subsequent search of the package and suitcase was unreasonable under the circumstances and violative of the Fourth and Fourteenth Amendments.

3. 49 U.S.C. §1511(b) and the Common Law Places an Obligation Upon Airlines to Inform Shippers That All Packages and Items Shipped Air Freight Are Subject to an X-Ray Magnetometer Scanning Process and Possible Subsequent Search. The Failure to Provide Reasonable Notice Denied the Petitioner of Protections Extended Under 49 U.S.C. §1511(b) and the Fourth and Fourteenth Amendments of the United States Constitution.

In 1974, Congress provided a comprehensive act covering air transporation protection and security. (Air Transportation Security Act, Pub. L. 93-366, Title II, 88 Stat. 415.) Over the years the courts have established rules, regulations and guidelines concerning air transportation security both by defining the laws provided and creating common law protections as necessary to protect Fourth Amendment rights.

Of major concern has been the question whether a passenger or shipper must be given notice of a right to refuse the magnetometer search and withdraw from boarding the flight or shipping the package. This is commonly known as "no-fly" option.

A number of jurisdictions view this option as a prerequisite to any search. Its necessity is rooted as an argument against the proposal that such magnetometer and subsequent searches are valid as a consent search. Many courts have ruled that there can be no consent without the initial opportunity to gather's one's belongings, walk way and choose not to board the plane. *United States v. Davis,* 482 F.2d 893, 912 (9th Cir. 1973); *United States v. Ruiz-Estrella,* 481 F.2d 723, 728 (2d Cir. 1973); *United States v. Dalpiaz,* 494 F.2d 374, 376 (6th Cir. 1974); *United States v. Clark,* 475 F.2d 249 (2d Cir. 1973); *United States*

v. Meulener, 351 F.Supp. 1284, 1289-1291 (C.D. Cal. 1972); *United States v. Miner,* 484 F.2d 1075, 1076-1077 (9th Cir. 1973); *People v. Hyde, supra* at 169; *People v. Dooley,* 64 Cal.App.3d 502, 134 Cal. Rptr. 573 (1976); *Morad v. Superior Court,* 44 Cal. App.3d 436, 118 Cal.Rptr. 519 (1974). Also see, Chief Judge FRIENDLY'S concurring opinion in *United States v. Bell,* 464 F.2d 667, 675 (2d Cir. 1975).

The 1974 Air Transportation Security Act set forth further protections with regard to air travel and shipment. In 1977, the Ninth Circuit in *United States v. Fannon,* 556 F.2d 961 (9th Cir. 1977), had occasion to interpret the statutes provided in the 1974 Act and stated:

> As a threshhold matter, searches of articles presented for air freight shipment . . . must be preceded by reasonable notice to the shipper that search is a condition of carriage. This notice may take various forms and will be deemed reasonable if sufficient to apprise the ordinary shipper of the condition. In effect, our holding in this case does no more than make explicit, under constitutional compulsion, the conditional consent to search which Congress impliedly inserted in all agreements for the carriage of goods in air transportation by enacting Section 1511(b). *Id.,* at 965. (footnotes omitted.)[1]

[1]The retroactive application is of concern here and the *Fannon* court refused to determine the issue. However, the petitioner submits that the ruling in *Fannon* is applicable in the present petition. The section cited in the opinion, 49 U.S.C. 1511(b) was enacted in 1974, *prior* to the circumstance in the present petition. Since this section was in effect at the time of the search, the petitioner contends that the language in *Fannon*

The petitioner submits that failure to notify the shipper of the airlines' procedure of x-raying the package and the potential of a subsequent search is a fatal flaw in the action taken at Logan Airport. It is clear that both the common law and the statutory law requires an individual the opportunity to refuse to submit to an x-ray screening process by choosing not to board the plane. It is the petitioner's contention that the same privilege of choice must apply to an individual who is placing a package aboard the plane for shipment. The shipper must be afforded the opportunity to remove the package if he so desires *prior* to any screening or x-ray procedure.

The petitioner contends that the concerns protected by the screening process (*i.e.,* the prohibition of firearms, bombs or other explosives from being placed or carried upon the plane) are the same whether these devices are being personally brought aboard or shipped by air freight. The underlying purpose behind this screening process is to protect the passengers that board from inconvenience, injury or death.

As expressed in the case of *United States v. Davis, supra,* at 910-911, "[i]t follows that airport screening searches are valid *only if they recognize the right of a person to avoid search by electing not to board the aircraft.*" (footnote omitted, emphasis added.) The court continued to state that, "airport screening searches of the persons and immediate possessions of

merely clarifies the rights afforded in 1974 to the public in general who ship their packages through air transportation. That right being the notice to the shipper that "search is a condition of carriage," *United States v. Fannon, supra,* at 965; and the opportunity to "avoid submitting to a search altogether by electing not to board the airplane." *People v. Hyde, supra,* at 158. Aslo see *United States v. Bell,* 464 F.2d 667, 675 (2d Cir. 1972).

the persons and immediate possessions of potential passengers for weapons are reasonable under the Fourth Amendment *provided each prospective boarder retains the right to leave rather than submit to the search.*" *Id.*, at 912. (Emphasis added.) The petitioner submits that it is a logical extension of this rule to afford a shipper the opportunity to withdraw the package from the method of air transportation in order to avoid a screening or x-ray device and any further search.

In the present case the shipper was not afforded such an opportunity. He was not informed by the airline employee of the screening process nor were there any warning signs or other indication or the impending x-ray procedure. The opportunity and decision to remove the package prior to such a screening process may only exist from the knowledge that the x-ray scan is the procedure to be followed by the airline.

> "To meet Fourth Amendment guarantees, the prospective passenger must be advised that he has to submit to a search if he wants to board the plane, but that he can decline to be searched if he chooses not to board the aircraft." *United States v. Meulener, supra* at 1289-1290.

California cases also provided that, "airport screening procedures must be as limited in intrusiveness as is consistent with their justification, and an individual may avoid submitting to a search altogether by electing not to board the airplane". *People v. Hyde, supra* at 169. Also see *People v. Dooley, supra;* and *Morad v. Superior Court, supra.* In addition, then California Chief Justice Wright's separate concurring opinion in *Hyde* (with Justices TOBRINER and SULLIVAN con-

curring) the issue of advance notice to the public was reiterated and emphasized in the following statement:

> "[O]f signal importance is the fact that airline passengers have *advance notice* that they will be subjected to a preentry screening for weapons and explosives. Although advance notice in itself cannot operate to deprive an individual of his Fourth Amendment rights, it nevertheless had been recognized by the courts and commentators as a factor of major significance in evaluating the extent to which individual privacy is compromised and intruded upon by governmental action. Advance notice enables the individual to avoid the embarrassment and psychological dislocation that surprise search causes. . . . Advance notice, therefore, operates to diminish significantly the privacy intrusion incident to airport searches and acts as a counterblance to the reduced level of Fourth Amendment protections surrounding such searches."

Since there was no such warning to the shipper, he had no opportunity to regain possession of the package, cancel the shipment order, and refuse to subject his package to such a search. The cases and the statutory language make it clear that the right to refuse to a scanner or other x-ray device is afforded to a passenger who intends to board a plane. The petitioner submits that such a right must extend to an individual who intends to place a package aboard a plane. In both situations, it is necessary for the party involved to have that opportunity to walk away, and avoid being subjected or having the package being subjected to an x-ray or screening device. The petitioner

contends that since the shipper was not extended such *right of choice, that any subsequent search becomes fatally defective.*

The petitioner submits that the search of the package and suitcase was conducted in violation of both the statutory requirement to warn of such possible searches and the common law obligation placed upon the airlines, as warranted by the Fourth and Fourteenth Amendments, to provide a shipper or passenger the opportunity to withdraw from the search procedure and not board the plane. Not only is the search conducted at Logan's Airport, Boston, Massachusetts, illegal and constitutionally invalid, but all subsequent evidence obtained as a result of the initial search must be suppressed.

When the method of obtaining evidence is illegal, this unconstitutional activity taints the acquisition of the evidence and, therefore, all products obtained through this unlawful process must be excluded as fruits of the poisonous tree. *Wong Sun v. United States,* 371 U.S. 471 (1963). Such is the case in the present petition, and therefore, the petitioner submits that all evidence obtained, including the items seized in the searches conducted in California, must be excluded.

4. The Denial of Pretrial Discovery Denied the Petitioner of a Fair Trial and Due Process Protections of the United States Constitution.

While it is admitted that the refusal of discovery of evidence in possession of the prosecution does not necessarily violate a defendant's rights of due process (*Jones v. Superior Court,* 58 Cal.2d 56, 59, 372 P.2d 919 (1962); *People v. Lindsay,* 227 Cal.App.2d 482, 38 Cal.Rptr. 755 (1964); *Campbell v. United States,* 365 U.S. 85, 86 (1961)), this concept nevertheless

still is repugnant to our Constitution's principles of justice and the right to a fair trial. *Cash v. Superior Court,* 53 Cal.2d 72, 346 P.2d 407 (1959); *Powell v. Superior Court,* 48 Cal.2d 704, 312 P.2d 698 (1957); *Pitchess v. Superior Court,* 11 Cal.3d 531, 522 P.2d 305 (1974). In addition, the court in *Brady v. Maryland,* 373 U.S. 83 (1963), ruled that the suppression by the prosecutor of favorable evidence for the defendant "was a violation of the Due Process Clause of the Fourteenth Amendment". 375 U.S. at 86.

The basic theory followed by California courts concerning criminal discovery was expressed in *People v. Riser,* 47 Cal.2d 566, 305 P.2d 1 (1956):

> Absent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, *the state has no interest in denying the accused access to all evidence that can throw light on issues in the case,* and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence permits. *Id.,* at 586 (emphasis added); *Hill v. Superior Court,* 10 Cal. 3d 812, 816, 112 Cal.Rptr. 257 (1974); *Engstrom v. Superior Court,* 20 Cal.App.3d 240, 243, 97 Cal.Rptr. 484 (1971).
>
> [I]n contrast to the formal requirements for civil discovery, an accused in a criminal prosecution may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial. *Pitchess v. Superior Court, supra* at 536, citing *Cash v.*

Superior Court, supra; and *Powell v. Superior Court, supra* at 707.

"Allowing an accused the right to discovery is based on the fundamental proposition that he is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information." *Pitchess v. Superior Court, supra,* at 535; see also *Hill v. Superior Court, supra,* at 816.

In the present case, petitioner sought by timely motion to discover the capabilities and limitations of the x-ray machine located at Boston's Logan Airport used to examine the package subsequently opened and searched by Officer RICHARD DAVIS. As stated in an affidavit filed in support of the motion, the desired information was necessary in order to properly prepare the case for trial; was material and relevant to the trial; under the control of the prosecution; and not known to the petitioner or his counsel. It was asserted below that the requested information would greatly assist on the issue of probable cause, or lack thereof, that existed prior to the search of the package and the subsequent search of the suitcase contained therein. The importance of this information is clear when the right to search the package stems from the probable cause to believe that the package contained a bomb. Without sufficient probable cause, the contraband subsequently discovered must be suppressed. This element is at the very root of a fair trial and the discovery would greatly assist in providing a clear understanding of the issues. Further, petitioner contended the information would facilitate in the ascertainment of the facts and a fair trial by enabling the rigorous cross-examination of material witnesses.

Further, the requested information was available to the prosecution and not otherwise available to the defense. It is clear that even in the absence of a request, the state has a duty to disclose all substantial material favorable to the defense. *People v. Rutherford,* 14 Cal.3d 399, 534 P.2d 1341 (1975); *Brady v. Maryland, supra, In re Ferguson,* 5 Cal.3d 525, 487 P.2d 1234 (1971).

Therefore, petitioner submits the lower court exceeded and abused its discretion in upholding the denial of the discovery motion where the requested discovery would have facilitated the ascertainment of the facts and a fair trial; where the information was necessary for the preparation of an informed and intelligent defense; where petitioner specifically enumerated the desired information and was not engaged in a "fishing expedition"; and where there was a reasonable probability the obtaining of the information would have resulted in a more favorable result for the petitioner. Thus, this denial of discovery constitutes reversible error.

5. The Warrantless Search of Petitioner's Residence Cannot Be Justified as a Search Based on Consent. The State Court's Ruling That Consent Was Freely and Voluntarily Given Was in Contradiction to the Guidelines Set Forth by This Honorable Court and in Violation of the Petitioner's Fourth and Fourteenth Amendment Rights.

In *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973), the court agreed with the California courts by stating, "that the question whether a consent to search was, in fact 'voluntarily' or was the product of duress or coercion, expressed or implied, is a ques-

tion of fact *to be determined from the totality of all the circumstances.*" *Id.*, at 227 (emphasis added.) The court emphasized that the weighing process to determine whether in fact a defendant's consent to search was "voluntary" should not be mechanical:

> . . . it is only by analyzing all of the circumstances of an individual consent can it be ascertained whether, in fact, it was voluntary or coerced. It is this careful sifting of the unique facts and circumstances of each case that is evidenced in our prior decisions involving consent searches. (412 U.S. at 227.)

The court further noted:

> In examining all the surrounding circumstances to determine if, in fact, the consent was coerced, account must be taken of the subtly coercive police questions, as well as the possibly vulnerable subjective state of the person who consents. (412 U.S. at 229.)

The court warned that a consent to search that was not the product of the free and unconstrained will of a defendant should not be tolerated,

> . . . the Fourth and Fourteenth Amendments require that the consent not be coerced, by explicit or implicit means, by implied threat or covert force. For no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. (412 U.S. at 228.)

Further, the California courts have applied the principle that where an acknowledgment to a search was dominated by covert threats or by implied assertions

of superior authority it is increasingly necessary to deny the efficacy of any "consent" given. *Parrish v. Civil Service Commission,* 66 Cal.2d 268, 269, 425 P.2d 223 (1967).

Petitioner submits that the facts of the present petition demonstrate that the lower courts were clearly erroneous in finding that his consent to search, following his arrest, was given freely and voluntarily. The petitioner was in custody and was immediately placed in handcuffs.[2] The officers took the petitioner into the bedroom where one of the seven or eight officers present had observed the suitcase they identified as containing contraband.

After what the officers believed was marijuana, the officers then requested permission to search the entire house. Hesitating, petitioner agreed to a limited search of the bedroom closet. The officer stated the limited search was not enough, that he must have consent to search the entire house "to complete his work". The officer continued by informing the petitioner that if his consent was not given, he would obtain a search

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[2]At least one circuit has determined that although the fact of custody alone does not preclude the giving of a voluntary consent, it does render the search subject to a more careful scrutiny. [*United States v. Wiener,* 534 F.2d 15 (2d Cir. 1976); citing *United States v. Watson,* 423 U.S. 411 (1976); *United States v. Candella,* 469 F.2d 173, 175 (2d Cir. 1972); *United States ex rel. Lundergan v. McMann,* 417 F.2d 519, 521 (2d Cir. 1969).] Another circuit has approached the problem with the attitude that the obtaining of consent from a person in custody is inherently suspect. [*United States v. Jones,* 475 F.2d 723 (5th Cir. 1973), *cert. denied,* 414 U.S. 841 (1974).] Other circuits have emphasized that where a suspect is in custody, the "psychological atmosphere" in which a consent to search is obtained is of critical importance. [*United States v. Griffin,* 530 F.2d 739, 743 (7th Cir. 1976); *United States v. Rothman,* 492 F.2d 1260, 1265 (9th Cir. 1973); *United States v. Hearn,* 496 F.2d 236, 241-244 (6th Cir. 1974).]

warrant. Petitioner was not advised that he had a right to refuse this warrantless search. After this series of events, the petitioner finally agreed to a search of the residence.

Apparently, after giving the oral consent, the petitioner was asked and refused to sign a written consent. The petitioner in no way assisted the officers in their search of the residence.

The California courts have viewed this type of situation with close scrutiny. The fact that consent was at least partially induced by advising the petitioner that a search warrant would be obtained if a consent was not given is by itself insufficient to invalidate the consent. However, its coercive effect when combined with other factors is clear. See *People v. Ruster,* 16 Cal.3d 690, 548 P.2d 353 (1976); *People v. McClure,* 39 Cal.App.3d 64, 113 Cal.Rptr. 815 (1974). In addition, though many courts have held that there is no duty to inform persons of their right to refuse consent, it has been recognized that "failure to give such advice may, under the circumstances of a given case, be a factor to be taken into consideration in determining whether or not free consent was actually given." *People v. Superior Court,* 71 Cal.2d 265, 270 fn. 7, 445 P.2d 146 (1969); *People v. Martinez,* 259 Cal.App.2d Supp. 943, 945, 65 Cal.Rptr. 920 (1968).

In the present case, petitioner submits that in considering the "totality of the circumstances," the consent to search was not freely and voluntarily given and the lower court erred as a matter of law. *Johnson v. United States,* 333 U.S. 10 (1949); *Bumper v. North Carolina,* 391 U.S. 543 (1968).

Assuming *arguendo,* that the consent obtained was voluntarily given, the petitioner submits that such consent was withdrawan[3] and further that the search of the entire residence was unreasonable and beyond the scope necessary under the facts.[4]

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[3]In *People v. Martinez, supra* at 946, the court found, "No reason to distinguish between withdrawal of waiver of legal representation during investigation and withdrawal of consent to search once given." Also see *People v. Botos,* 27 Cal.App.3d 774, 779, 104 Cal.Rptr. 193 (1972); *People v. Escollias,* 264 Cal.App.2d 16, 18, 70 Cal.Rptr. 65 (1968). In the present case, the fact that the petitioner refused to sign a written consent and the additional failure to assist the officers in opening a locked suitcase are indicative that the petitioner withdrew his consent after his initial agreement.

[4]The landmark case of *Chimel v. California,* 395 U.S. 752 (1969), set forth the rule that a search incident to an arrest is applicable only to the arrestee's person and to the area within the immediate control of the person arrested. *Also see Vale v. Louisiana,* 399 U.S. 30 (1970). California in *People v. Block,* 6 Cal.3d 239, 243, 244, 499 P.2d 961 (1971); and *Dillion v. Superior Court,* 7 Cal.3d 305, 314, 497 P.2d 505 (1972) permits the search for additional suspects, but warned that "the mere possibility of additional persons in the house without more, is not enough to provide probable cause to search the entire premises for additional suspects once the suspects whom the officers had sought were arrested." In the present petition, the search was not reasonably confined to the area immediately under the arrestee's control. Petitioner Gurtenstein and Kathleen Campbell were both arrested in a hallway of the house. They were also immediately handcuffed. Nevertheless, the officers for some unexplained reason took Campbell to the kitchen and petitioner Gurtenstein to the bedroom, instead of immediately transporting each to a police vehicle. At that point, the officers did not have specific and articulable facts regarding other possible suspects to justify the rampant search of the entire residence, including the bedroom. Once the occupants were in custody and handcuffed, obviously at that point, the officers did not have a reasonable fear for their safety or for destruction of evidence. Therefore, the scope of the search subsequent to the arrest was unreasonable in scope and the evidence under all circumstances should be suppressed as a fruit of an illegal search.

Conclusion.

The issues of airport x-ray screenings and searches are of extreme importance in light of the everyday use of the airlines for transportation and shipping. With the conflict in decisions by the various states and federal jurisdictions, there is a need for direction and guidance by this Honorable Court. The present petition raises crucial issues of search and seizure procedure and statutory interpretation as it relates to airport searches and the Fourth and Fourteenth Amendments.

In view of the foregoing arguments, it is respectfully submitted that this petition be granted.

RON MINKIN, ESQ.,
Attorney for Petitioner.

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Five.

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent v. PETER BARRY GURTENSTEIN, Defendant and Appellant. 2d Crim. 28714 (L.A.S.C. No. A 188 223).

Filed April 29, 1977

Los Angeles Superior Court No. A 188 223

NEWELL BARRETT, Judge

RON MINKIN for Defendant and Appellant.
EVELLE J. YOUNGER, Attorney General.
JACK R. WINKLER, Chief Assistant Attorney General Criminal Division.
S. CLARK MOORE, Assistant Attorney General.
NORMAN H. SOKOLOW and ROY C. PREMINGER, Deputy Attorneys General for Plaintiff and Respondent.

Defendant, Peter Gurtenstein, and co-defendant, Kathleen Ann Campbell,[1] entered a plea of guilty to the crime of possession of barbiturates for the purpose of sale (Health and Safety Code §11378, Subd. (a)). Proceedings were suspended without imposition of sentence, and Gurtenstein was placed on probation for a period of three years on certain terms and conditions. Defendant Gurtenstein appeals from the judgment (order granting probation), contending (1) that the trial court erred in denying his motion for discovery; and, (2) that his motion to suppress evidence (Penal Code §1538.5) should have been granted.

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[1]Co-defendant, Kathleen Ann Campbell, withdrew her appeal.

The facts adduced in connection with the section 1538.5 hearing were as follows: At about 3:15 p.m., on April 9, 1975, Frank Campbell was working at the TWA Baggage Service office at Logan International Airport in Boston, Massachusetts, when a man came up to the counter with a package. The man said he wanted it shipped to Los Angeles on TWA's next flight which left at 4 p.m. Campbell noticed that it was a cardboard box (about 18 inches wide and six to eight inches high) covered with wrapping paper and taped. He estimated that it weighed about 30 pounds. He also noticed that there was no addressee or sender written on the package. After Campbell informed the man this information should be supplied, he wrote, "One of a Kind" in Los Angeles as the addressee and the name of a plant company as the sender. When Campbell wrote up the airbill the man told him the package contained fabric or cloth. Campbell thought the package weighed more than one that size containing cloth would weigh. He also noted that the man appeared to be a "little nervous" and "overanxious." He kept asking if the package would get on the next flight. Campbell assured him that it would get on the aircraft without any trouble and gave him a copy of the shipping bill.

Because the man seemed so anxious about getting the package on the 4 o'clock flight and because the package felt heavier than it should, Campbell suspected that there might be a bomb in the package. Because of his suspicions, he had the package X-rayed. However, the X-ray only showed that there was something like the shape of a suitcase inside the box. Campbell thought it was unusual that the man had not mentioned that there was a suitcase inside the wrapping so he took

the package back to his counter area and notified his supervisor. Thereafter, Officer Davis of the Massachusetts State Bomb Squad was notified. Campbell apprised him of the situation. Davis picked up the box and estimated that it weighed between 30 and 35 pounds. Officer Davis was also suspicious about the package, especially since Campbell was so nervous. Officer Davis had known Campbell for a long time and he had never seen him so apprehensive. His suspicion was further aroused when Campbell mentioned how the man did not originally have the names of the addressee or sender on the package. He examined the airbill which the man had signed. He could not make out a single letter in the person's signature.

On the basis of his experience as a bomb expert, the officer was aware of several types of bombs which did not require any metal in their construction and which would, therefore, not show up on an X-ray machine. Most of these bombs are constructed with a combination of chemicals and plastics. Some bombs are able to be triggered barometrically as a result of the lessening of the density of the air when the aircraft increases its altitude. Some are of the "time-delay" variety which works by the erosion of acid through rubber or plastic causing the mixing of two chemicals which starts a fire. Other than by opening the package, there is no way to determine if it contains a non-metallic bomb.

Officer Davis opened the cardboard wrapping and saw what appeared to be a new Samsonite suitcase. After examining the cardboard wrapping and suitcase for "booby trap type devices" he slid the suitcase onto the counter. He then unlocked the combination lock and opened it up. Inside were seven transparent

frozen food type bags containing tablets. The State Narcotics Unit was then notified. Six days later about 200 of the red tablets and 200 of the white tablets were sent on to Los Angeles.

On the evening of April 15, 1975, Officer Stanley of the Los Angeles administrative narcotics division obtained custody of the package at the Los Angeles International Airport. After the bags containing the tablets had been dusted with ultraviolet powder, they were repackaged and returned to the TWA baggage facility. Shortly thereafter, codefendant Kathleen Campbell picked up the package and drove to a residence in Palos Verdes Estates. Officer Stanley and several other officers followed. Upon their arrival Officer Stanley went to the rear of the house while Agent Daly and Officers Gossett and Walker walked up to the front of the house. Daly testified that there was a window in the front door, which was covered with a thin gauze curtain. After knocking he saw defendant approach the door. He then announced, "Federal Agents. You're under arrest" and defendant started running toward the rear of the house. Glass was shattered. Daly entered the house and Stanley went in through the rear door. He ran into a hallway leading into a rear bedroom and saw defendant already in custody. The package Campbell picked up at the airport was on top of the bed. He also saw on the floor a cardboard box top containing marijuana. Stanley took defendant into the bedroom and advised him that he was under arrest for possession of dangerous drugs. He advised defendant of his rights and asked him for identification. Defendant gave him a California driver's license bearing the name "Gurtenstein." He then asked defendant if he lived at the residence. Defendant replied that he was temporarily living there,

that the people who owned the house were named Willis, and that they were away on vacation. Stanley looked through defendant's identification and found a real estate company's card. He telephoned the company and talked with a real estate agent who described the person who had rented the house. The description fit defendant. Defendant then admitted, "It's me. I rented the house under the name Willis." Stanley then told defendant he wanted to search the house for additional contraband and advised him that he could either apply for a search warrant or have defendant's consent to search the house; that if he applied for a search warrant it would be up to the magistrate to determine whether to issue the warrant. Defendant hesitated briefly and then said he could go ahead and "search the closet." The officer replied that that "wasn't enough" and to complete his work he would have to have a consent to search the entire house. Defendant then stated, "Well, you've got the marijuana. Go ahead and search. You can go ahead and search the house." The officers found a brown suitcase inside the closet. Defendant said it was not his. Officer Stanley forced it open and inside, he found seven bags of red tablets resembling Seconal (secobarbital). The officers also discovered a loaded gun, $5,000 cash, and various narcotic paraphernalia.

After they were half way through searching the house, Stanley asked defendant if he would sign a written consent to search. Defendant refused to sign a written consent, however, he did not retract or withdraw his earlier verbal consent.

After the search, an ultraviolet light test revealed traces of ultraviolet powder on the hands of both Campbell and defendant.

Testifying in his own behalf, defendant stated that the first he was aware of law enforcement officers at his house was when he heard someone yell, "Federal Agents. You're under arrest." A second or two later, the officers broke through the front door, entered his house and immediately handcuffed him.

Defendant denied that Stanley advised him of his rights. He stated that Stanley told him "There's two ways we can go about [searching the premises]. We can either get your consent to search or get a search warrant. . . . It would be easier for everyone concerned if consent was given." Defendant refused to give his consent. The officer then noticed the tray of marijuana in the bedroom, and said that that gave them "[probable] cause to search." The officers then proceeded to search the residence without his consent. During their search, Stanley asked him to sign a consent to search. He refused.

On rebuttal Agent Daly stated that his entry was made about eight seconds after he announced his presence.

Defendant made a pretrial motion for discovery of the following information pertaining to the X-ray machine located at Boston's Logan Airport used to examine the package opened and searched by Officer Davis: (1) The name of the manufacturer, model and serial number of the machine; (2) all information and instructions regarding the standard procedures and principles in operating the machine; (3) all information, instruction or manual instructions from the maker, the airlines or other sources to persons operating the machine; (4) all information relating to the reaction of the machine to various items and objects, including but not limited to cloth, clothing, books, and types

of explosive devices; (5) a list of all types of items, materials, substances, and objects that will not register on the machine as anything other than a blank when subjected to the machine; and (6) any and all other relevant information.

Defendant contends that the trial court erred in denying this discovery motion. He argues that the information requested was material to both the issue of probable cause to search and in the cross-examination of prosecution witnesses Frank Campbell and Officer Davis. He further asserts that the information which the defense sought to discover was available to the prosecution and not otherwise available to the defense.

A defendant's motion to discover is addressed to the sound discretion of the trial court, which has inherent power to order discovery when the interests of justice so demand. (*Pitchess v. Superior Court*, 11 Cal.3d 531, 535; *Hill v. Superior Court*, 10 Cal.3d 812, 816.) "Allowing an accused the right to discover is based on the fundamental proposition that he is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information." (*Pitchess v. Superior Court, supra.*) An accused, however, is not entitled to inspect material as a matter of right without a prior showing of good cause. It must appear reasonable that knowledge of such information will assist him in preparing his defense. The court has discretion to deny discovery in the absence of a showing which furnishes a "plausible justification" for inspection. (*Hill v. Superior Court, supra*, at p. 817.)

In the present case, the evidence showed that the X-ray machine would not reveal a bomb inside a package if the bomb were the "altimeter type" where chemi-

cals ignite or combine due to a lessening of pressure. An explosive device might be detected by an X-ray only if there were some outline revealed suggesting such a device, *i.e.*, an item in the shape of a can, an oblong article, an alarm clock, or sticks of dynamite. When an X-ray was taken of the package in question, the machine only showed the outline of a suitcase. Campbell testified that he did not see anything suspicious when he X-rayed the package, and Davis testified that he did not X-ray the package. Thus, the information requested by defendants in his motion was not relevant nor could such information have assisted defendant in preparing his defense. Furthermore, there is nothing in the record which indicates that such information was available to the prosecution but not available to the defense. From an examination of the record of the hearing on the motion, it appears that the prosecution did not have such information, however, the defense in essence argued that it would be easier for the prosecution to obtain it and transmit it to the defense. Thus, had defendant's motion been granted, compliance would have required the prosecution to prepare the case for the defense. This is an obligation not imposed by the law. (See *People v. Cohen*, 12 Cal.App.3d 293, 323.) The trial court did not err in denying defendant's motion for discovery.

Defendant contends that Officer Davis' search of the package at the Boston airport was unlawful because he possessed no information which justified his suspicion that the package contained a bomb. This contention is without merit.

Here, Officer Davis searched the package as part of a screening program designed to prevent the placement of a bomb in aircraft luggage. Contrary to defendant's assertion, the officer was justified in suspecting that the package may have contained some type of explosive device. The man who left the package was very insistent that the package go to Los Angeles on the next flight at 4 p.m., even though other flights were taking off at approximately the same time and to the same destination. Further, when he initially handed the package to Campbell, there was no name of an addressee *or* sender on the package. The signature the man placed on the airbill was illegible. Officer Davis testified that he had known Campbell for a long time and had never seen him so nervous about a piece of luggage. Campbell also told Davis that the man who left the package said the package contained fabric. However, Campbell lifted the package and thought that the package was too heavy for its size to just contain fabric. Even though the X-ray did not reveal any metallic bomb or explosive device, it was possible that the package could have contained an altimeter type bomb. Clearly, under these circumstances the officer was justified in opening the suitcase to determine if, in fact, it did contain explosives. (See *People v. Hyde*, 12 Cal.3d 158, 165-168.) The exigencies of the situation obviated any necessity for obtaining a search warrant. The plane the shipper had insisted the package be shipped on was due to leave shortly after Davis opened the package. Thus, if the package had contained an explosive, it was logical to assume that it was set to explode in a short while. In any event, the package was an easily movable object and to hold it while waiting for a warrant would also constitute a seizure. (*People v. Goodyear*, 54 Cal.App. 3d 157, 162.) As noted in *People v. Hyde, supra*,

at page 168, "Airport searches are singularly unsuited to the warrant procedure."

Accordingly, by reason of the foregoing, we conclude that Officer Davis' search of the package was reasonable. There was substantial evidence to support the trial court's ruling that the contraband was not the product of an unlawful search and seizure.

Defendant also contends that the search of his residence by the police and federal narcotics agents was unlawful because (1) he did not voluntarily consent to the search, (2) he withdrew his consent prior to the completion of the search and (3) the scope of the search was unreasonable.

> " '[T]he question whether a consent to a search was in fact "voluntary" or was the product of duress or coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances.' [Citations.] The trier of fact's resolution of this question will not be disturbed on appeal if there is substantial evidence to support it. [Citations.]" (*People v. Ruster*, 16 Cal.3d 690, 701.)

In the present case, after advising defendant of his constitutional rights, Officer Stanley told defendant that he wanted to search his house. He advised defendant that he "could either apply for a search warrant . . . [o]r [he] could have his consent to search the house." Defendant agreed to a search of the closet. The officer replied that that "wasn't enough . . . that [he] would have to have a consent to search the entire house, and [he] would go down and apply for a search warrant." These statements, however, cannot be considered coercive since the officer was merely telling the

defendant what he had a legal right to do. (*People v. Ward*, 27 Cal.App.3d 218, 224-225; *People v. Rupar*, 244 Cal.App.2d 292, 298.) Moreover, there was no evidence that defendant's consent to search was actually motivated by the officer's statement regarding the possibility of obtaining a warrant. In fact, defendant stated at the trial that he did not give permission to the officers to search his home and that the officers proceeded to search without his consent.

Defendant further argues that his consent was not voluntary because he was not advised of his right to refuse consent. However, an advisement to defendant of his right to refuse consent to a search is not a prerequisite to establishing that defendant voluntarily consented. (*People v. Wheeler*, 23 Cal.App.3d 290, 305; *People v. Thomas*, 12 Cal.App.3d 1102, 1108-1111.) Moreover, the officer told defendant that he could consent or a warrant would be sought. This was tantamount to advising defendant that he had a right to refuse consent.

Contrary to defendant's arguments, there is nothing in the record to indicate that the presence of "seven to eight officers" contributed to defendant giving his consent. The record shows that Officer Stanley was the only officer who spoke to defendant about a search. From the record, it cannot be said that defendant's consent to search of his residence was involuntary as a matter of law.

Defendant also claims that his refusal to sign a written consent and his declining to assist the officer in opening the suitcase found in the closet amounted to a withdrawal of his previously given consent. It is true that a voluntary consent to search may be

withdrawn at any time before the search is completed. (*People v. Martinez,* 259 Cal.App.2d Supp. 943, 945.) Actions inconsistent with consent may act as a withdrawal if those actions are positive in nature. (*People v. Botos,* 27 Cal.App.3d 774, 779.)

Here, defendant did nothing to indicate that he was withdrawing his consent. He merely refused to sign a written consent. He did not state he was withdrawing his oral consent. In addition, the record shows that defendant did not refuse to help the officer open the suitcase. Defendant only told the officer that the suitcase was not his. He did not refuse to let the officer open it up himself.

Citing *Chimel v. California,* 395 U.S. 752, defendant contends that the search was unlawful because it exceeded the permissible scope of a search incident to his arrest, i.e., the area immediately under his control at the time of his arrest. However, the search of defendant's residence was not a search incident to his arrest. Rather, it was made pursuant to his consent (as discussed, *supra*). The search of his residence was not unlawful.

The motion to suppress under Penal Code section 1538.5 was properly denied, and the judgment (order granting probation) is affirmed.

CERTIFIED FOR PUBLICATION

Hastings, *J.*

We concur:

Kaus, *P. J.*

Ashby, *J.*

APPENDIX B.

Order of the Supreme Court of California.

Clerk's Office, Supreme Court
4250 State Building
San Francisco, California 94102

August 25, 1977

I have this day filed Order HEARING DENIED.

In Re: 2 Crim. No. 28714

People v. Gurtenstein

Respectfully,
G. E. BISHEL
Clerk